

No. 87-1748

Supreme Court, U.S.

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JOSEPH E. SPANIO, JR.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

—◆—
NEWSDAY, INC.,

Petitioner,

—v.—

ROBERT J. SISE, as Chief Administrative Judge of the Office of
Court Administration of the State of New York, and
THOMAS HENNESSEY, as the Commissioner of Jurors of
the County of Suffolk,

Respondents.

—
ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF NEW YORK

PETITIONER'S REPLY MEMORANDUM

ROBERT LLOYD RASKOPF
Townley & Updike
405 Lexington Avenue
New York, New York 10174
(212) 973-6000

Of Counsel:

HARRY T. WALTERS

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Newsday, Inc. submits this reply brief in further support of its petition for a writ of certiorari.

Several of Respondents' arguments are worthy of brief rejoinder.

First, Respondents claim that the New York Court of Appeals "offered no view whatsoever whether" Newsday had a

constitutional right of access to juror names and addresses. Brief in Opposition at 7. This claim is transparently false. The Court of Appeals said

We also reject petitioner's assertion that it is entitled to the jurors' names and addresses under the public's constitutional right of access to criminal proceedings Inasmuch as petitioner has not contended that it has been denied access to any judicial proceedings or to any transcripts of any proceedings, petitioner's constitutional right of access has not been violated.

Newsday, Inc. v. Sise, 71 N.Y.2d 145, 154 n.4, 524 N.Y.S.2d 35, 39 n.4, 518 N. E.2d 930, 933 n.4 (1987). Even if Respondents were correct and the Court of Appeals had ignored the constitutional question, it is difficult to see how this strengthens Respondents' hand: failure to consider the issue would equally affront *Newsday's* First Amendment rights.

Second, Respondents apparently contend that N.Y. Judiciary Law § 509(a) is a legislatively enacted vehicle for allowing *Newsday* to vindicate its First Amendment right of access to juror names and addresses. Brief in Opposition at 7-8, 11-12. Respondents make this claim despite the fact that

- The statute became effective in 1978, prior to the decisions of this Court which established the First Amendment right of access;
- The statute articulates *no* standard for the release of juror names and addresses, much less a standard congruent to the one enunciated by this Court for access to criminal proceedings;
- The Court of Appeals, far from directing the Appellate Division to use § 509(a) to protect the public's First Amendment right of access, Brief in Opposition at 7, rejected *Newsday's* claim of a First Amendment right; and

- The Court of Appeals decision forces the public to resort to a statute which “categorically prohibit[s]” disclosure of juror names and addresses, 71 N.Y.2d at 153, 524 N.Y.S.2d at 39, 518 N. E.2d at 933.

With respect to § 509(a), the most that Respondents can promise is that the Appellate Division “may” apply a “First Amendment balancing test.” Brief in Opposition at 7. Respondents, of course, are in no position to keep that promise. Indeed, the Appellate Division will be bound to follow the holding of the Court of Appeals that there is no constitutional right of access to the records Newsday seeks. Thus, even if Newsday were to apply to the Appellate Division for access, the Court of Appeals’ decision effectively precludes any counterweight to balance against § 509(a)’s prohibition on access.

Third, the First Amendment right of access to the criminal judicial process, as Respondents concede, has been extended beyond mere attendance at court proceedings. Brief in Opposition at 9; see Petition at 8-10 (citing and discussing cases). It is clear that this Court intended its decisions in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (“*Press-Enterprise I*”), and *Press-Enterprise Co. v. Superior Court*, ____ U.S. ____, 106 S.Ct. 2735 (1986) (“*Press-Enterprise II*”) to have this broader application. This Court’s decisions have turned not on whether access was sought to a “judicial proceeding” or to “transcripts of proceedings” but rather on whether access to the particular process advances the First Amendment interest of an informed public discussion and understanding of the criminal process. See, e.g. *Globe Newspaper*, 457 U.S. at 604-05; *Press-Enterprise I*, 464 U.S. at 516 (Stevens, J., concurring) (“[T]he distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues”). One circuit court and two district courts, following this Court’s clear signal, have afforded a

right of access to juror names and addresses.¹ *In re Baltimore Sun Co.*, 841 F.2d 74 (4th Cir. 1988)²; *United States v. Doherty*, 675 F.Supp 719, 14 Media L. Rep. (BNA) 1407 (D.C. Mass. 1987); *In re New York Times Co.*, Misc. No. 82-0124 (D.D.C. June 19, 1982). The issue is surely ripe for this Court's plenary consideration.

Fourth, respondents do not—and cannot—deny that the identities of jurors have traditionally been available and that information obtained through access to jurors plays a significant positive role in the functioning of the judicial process and the government as a whole. See Petition at 12-18. Access to jurors not only helps to inform the public; it helps to shape public debate on important legal and political issues. Plenary review is required to vindicate Newsday's important First Amendment rights.

1 Respondents rely on language in *Radio & Television News Ass'n. v. U.S. District Court*, 781 F.2d 1443 (9th Cir. 1986) ("RTNA"), to support their assertion that the First Amendment right does not extend beyond the right to attend court proceedings. RTNA, unlike the present case, involved a gag order imposed *during* a criminal trial to avoid prejudicing defendants' fair trial right. Cf. *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1306 (1983) (opinion in chambers) ("Insofar as the State's interest is in shielding jurors from pressure during the course of the trial, so as to ensure the defendant a fair trial, that interest becomes attenuated after the jury brings in its verdict and is discharged"). In addition, Respondents' position wholly ignores the decisions (1) holding that the First Amendment right applies to materials and information other than judicial proceedings, see Petition at 8-9; (2) striking down restrictions on the right of the media to interview jurors after a verdict has been rendered, see, e.g., *Journal Pub. Co. v. Mechem*, 801 F.2d 1233 (10th Cir. 1986); *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978); and (3) specifically recognizing a First Amendment right of access to juror names and addresses.

2 While the Fourth Circuit, almost as an afterthought, disclaimed making a First Amendment determination, 841 F.2d at 75 n.4, it expressly relied on this Court's decisions in *Press-Enterprise I* and *Press-Enterprise II* and, indeed, ventured that the Fifth Circuit, the only circuit to deny access to juror names and addresses, would reconsider its decision in light of the *Press-Enterprise* decisions. *In re Baltimore Sun*, 841 F.2d at 76.

Conclusion

For all the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. RAKSOPF
Townley & Updike
405 Lexington Avenue
New York, New York 10174
(212) 973-6000

Of Counsel:

Harry T. Walters

May 26, 1988